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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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DISPATCHED BY

In re Applications of	)	MM DOCKET NO. <u>93-51</u>
	)	
MARTHA J. HUBER	)	File No. BPH-911114ME
	)	
RITA REYNA BRENT	)	File No. BPH-911115MC
	)	
MIDAMERICA ELECTRONICS SERVICE, INC.	)	File No. BPH-911115ML
	)	
STATON COMMUNICATIONS, INC.	)	File No. BPH-911115MU
	)	
For Construction Permit for a	)	
New FM Station on Channel 234A	)	
in New Albany, Indiana	)	

MEMORANDUM OPINION AND ORDER

Issued: May 27, 1993; Released: June 1, 1993

Background

1. This is a ruling on two motions to add issues against Martha J. Huber ("Huber"). A Motion To Enlarge Issues was filed on April 26, 1993, by Rita Reyna Brent ("Brent"). Also, on April 26, 1993, a First Motion Of Midamerica To Enlarge Issues Against Martha J. Huber was filed by Midamerica Electronics Services, Inc. ("Midamerica"). A Consolidated Opposition To Motions To Enlarge Issues was filed by Huber on May 11, 1993. Reply pleadings were filed by Brent and Midamerica on May 17, 1993, and May 19, 1993, respectively.

2. Brent seeks the addition of an issue to determine whether Huber is financially qualified to receive the grant. Midamerica seeks an additional issue to determine whether Huber made a false certification. The motions are based solely on inferences to be drawn from a bank letter and there are no affidavits which reflect facts sufficient to raise a substantial question of an intended misrepresentation. Therefore, consideration will be given here only to whether or not there is a substantial question as to whether Huber had a reasonable assurance of bank financing when she certified and whether she now has a reasonable assurance of bank financing to construct and operate for three months without station revenues. Cf the Presiding Judge's Memorandum

Opinion And Order, FCC 93M-276, released May 18, 1993, wherein he rejected the addition of a misrepresentation issue against Midamerica while adding a financial issue.<sup>1</sup>

### Facts

3. Ms. Huber filed her application on November 14, 1991. She certified at that time that she had a reasonable assurance of financing that would be sufficient to construct and operate based upon a bank letter.<sup>2</sup> The letter which she relied on was dated October 29, 1991, and it was signed by Mr. Leo Tierney, a Senior Vice President.

4. The letter states that the bank "would be interested" in loaning Huber up to \$350,000 for the purpose of constructing and operating a new FM station in New Albany. The loan period was stated to be "as long as two to five years" with interest "at a percent increment above the bank's prime rate." The bank would defer the payment of principal for the first year and collateral would be "all the tangible assets of the station." The letter concludes with an "assurance" of an "interest in assisting [Huber] to construct and operate the station." The letter also makes clear that formal approval of the bank would be required after the bank reviewed Huber's financial condition. The final agreement would be on "those terms and conditions that we deem appropriate." Huber's counsel had provided the bank with draft language which, if it had been incorporated in the letter, would have stated: "this bank is prepared to loan up to \$350,000" which would be for "a period of five years with interest at \_\_\_ percent" above prime. The bank did not utilize the suggested language.

5. Along with her Consolidated Opposition, Ms. Huber provided a second letter from Mr. Tierney dated May 5, 1993, a date after the filing of the motions to add the issues. The letter represents that Huber has been a customer of the bank for over 25 years, that the bank was familiar with her financial condition in October 1991, and that the bank also is familiar with her financial condition at the present time. Mr. Tierney also states that "the interest on the loan would be one percent (a percent increment) above the bank's prime rate" and that the loan would be for a minimum period of two years and a maximum of five years.

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<sup>1</sup> It is also noted that Midamerica's motion makes no reference to the addition of a forfeiture issue which would be required to accompany any added misrepresentation issue. See Prehearing Conference Order, FCC 93M-114, released March 19, 1993, at Para. 11 (forfeiture standards to be addressed where an added misrepresentation issue is sought by a party after release of a designation order). See also 47 C.F.R. §1.229(f).

<sup>2</sup> There are two successor banks: Citizens Fidelity Bank And Trust Company, Indiana and its successor, PNC Bank, Indiana, Inc. There will be reference made in this ruling to the "bank" which shall mean one or the other institution, depending upon the context.

### Discussion

6. The question raised by the Brent and Midamerica motions is whether the letter of October 1991 raises substantial issues of fact that must be resolved by a hearing on added issues. Frank Digesu, Sr., 7 F.C.C. Rcd 5459, 5460 (Comm'n 1992). There is no resolution in this ruling of the merits of the substantive issue. But there are substantial questions raised about whether the letter provided a reasonable assurance for certification at the time of filing the application. Those questions can only be resolved in a hearing.

7. The facts and circumstances surrounding the bank letter of October 1991 are similar to a case in which the Review Board added and remanded a financial issue to be resolved at a further hearing: Albert E. Gary, et al. 5 F.C.C. Rcd 6235 (Review Bd 1990). In that case, the trial judge denied a petition to add an issue where there was a bank letter which had not incorporated language requested by the applicant and which letter failed to specify repayment conditions, interest rate and required collateral. The issue was added and remanded by the Review Board even with the unrebutted testimony of the applicant in open court that the bank had an application and a financial statement of the applicant on record. The Review Board, under the circumstances, concluded that the bank's testimony would be required to clear up uncertainties. It is noted that the letter itself was only a commitment that the bank "may provide a loan" which is similar to the letter here where the bank has expressed only an "interest" in making a future loan. The standard set by the Commission is whether the bank has a "present firm intent to make a loan." Id. at 6237 [related citations omitted]. In that case, the Review Board held:

The bank letter, on its face, and the surrounding circumstances raise substantial and material questions of fact about whether any understanding was in fact reached between the applicant and the bank which would establish that the bank had a firm present intent to make a loan, as opposed to a mere willingness to consider the matter in the future.

Id. In this case, the language of the October 1991 letter does not express an unambiguous present firm intent. Huber argues in her Opposition that the phrase "would be interested in loaning up to \$350,000" is unconditional as compared with such language as "might be interested." That observation is credited only for the proposition that "would" is more definite than "might." But the word "would" only indicates the possibility of a future "interest" in making the loan which is more akin to an expression of a willingness to consider the matter in the future, a present frame of mind that has been held not to constitute the required "firm present intent." See Albert E. Gary, supra at 6237, Para.11.

8. The terms about the interest and the length of the loan are also sufficiently ambiguous to add an issue rather than face a remand. See Armando Garcia, 3 F.C.C. Rcd 1065 (Review Bd 1988) (a prima facie case is made for adding issues where documents raise substantial and material questions of fact). This ruling is consistent with the holdings in a trilogy of cases wherein the Review Board insisted upon the receipt at a hearing of substantial evidence that a bank letter was a "fundamental loan understanding" and not a "prospective lender's mere invitation to solicit an ordinary loan application at some later date." Shawn Phalen I, 5 F.C.C. Rcd 53 (Review Bd 1990). See also Shawn Phalen II, 5 F.C.C. Rcd 2622 (Review Bd 1990) (the appropriate inquiry is whether at the time of certification the applicant had a reasonable assurance of the funds). See also Shawn Phalen III, 5 F.C.C. Rcd 4669, 4670 (Review Bd 1990) (there can be no subsequent amendment to a new financial plan unless it is first shown that the applicant had a reasonable assurance at certification).

9. Ms. Huber has attempted to clarify the ambiguities in the first letter by a supplemental letter dated May 5, 1993. The need for the second letter illustrates the ambiguities of the first letter which was crucial to Huber's reasonable assurance at certification. If Huber had attempted to clarify the ambiguities through a good cause amendment, she would not have been permitted to do so without a showing of reasonable assurance under the first letter at certification. See Aspen FM, Inc., 6 F.C.C. Rcd 1602, 1603 (Comm'n 1991) (initial financial qualifications have become a critical ingredient in a good cause showing for financial amendments and reasonable assurance at certification must be shown before accepting an amendment). Since the May 1993 letter could not have served as a basis for an amendment, it will not be received at this point as a meritorious explanation of what was meant by the bank or reasonably understood by Huber in October 1991. Mr. Tierney would need to testify to the facts in open court and be subject to cross examination so that both letters can be considered in light of his testimony and the relevant documentary evidence. That evidence would include financial records of Huber that were on file with the bank in October 1991<sup>3</sup> and other financial records that are contemporaneous with Huber's certification.

10. Huber relies on cases which support the general proposition that the absence of a particular basic term is not fatal to a bank letter where other "key provisions are specified" and where "the overall circumstances demonstrate that reasonable assurance is present." See Salt City Communications, Inc., 7 F.C.C. Rcd 4221, 4226 Review Bd 1992), aff'd in part, 8 F.C.C. Rcd 683 (Comm'n 1993). That could be the outcome here after a

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<sup>3</sup> The banking relationship of twenty five years has not been explained. If Huber was a mere depositor, her bank would need to have obtained financial statements before issuing its letter.

hearing is held and findings are made on the added issue. But as delineated above, there are substantial questions raised by the language of the letter and the surrounding circumstances that warrant further inquiry.<sup>4</sup>

11. Huber also argues that the letter cannot be considered to be an "accommodation." That issue will not be addressed here except to note that if there is later seen to be a substantial question raised about an accommodation having been intended without any intent to ever make the loan, then a misrepresentation issue would also be added. At this point, the inquiry is limited to whether the letter gave and continues to give a reasonable assurance. However, in discovery, the parties will be inquiring through documents and deposition testimony whether there was an intended accommodation because, under general principles of discovery relevance, there is the same universe of discovery to be made. Therefore, while such discovery is authorized, it will be directed to the added issues of reasonable assurance only and it would not be undertaken for the purpose of searching for an accommodation issue which would be an improper use of discovery.

#### Rulings

Accordingly, IT IS ORDERED that the following issues are added:

- A. To determine whether, at the time she filed her application, Martha J. Huber was qualified to construct and operate her proposed FM station at New Albany, Indiana.
- B. To determine whether, at the present time, Martha J. Huber is financially qualified to construct and operate her proposed FM station at New Albany, Indiana.
- C. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether Martha J. Huber is qualified to receive a Commission permit to construct and operate her proposed FM station at New Albany, Indiana.

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<sup>4</sup> For example, Huber simply states that the phrase in the October 1991 letter - "a percent increment" - can only be interpreted as meaning "one percent." But without testimony and cross examination, the record would not develop the alternative thesis that it could mean whatever the Bank's percent increment is that may be in effect when the loan is made. There may be a bank policy statement which clarifies its practice in the application of "a percent income" to future loans. But to let that substantial question pass without further inquiry would be inviting a remand.

IT IS FURTHER ORDERED that the burden of proceeding and the burden of proof ARE ASSIGNED to Martha J. Huber.

IT IS FURTHER ORDERED that discovery SHALL COMMENCE within three days of the release of this ruling; that documents identified by Huber SHALL BE PRODUCED by Midamerica within thirteen days of the release of this ruling; and that all depositions will be noticed within twenty days of the release of this ruling.<sup>5</sup>

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel  
Administrative Law Judge

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<sup>5</sup> It is noted that Brent's Motion To Enlarge Issues has included the required request for documents which is self-executing under the new procedures. 47 C.F.R. §1.229(e). The scope of the request is reasonable. Brent or Midamerica must submit any subpoena request for bank discovery within twenty days of the release of this ruling. All efforts to arrange for voluntary compliance by the bank will be made, recognizing that banks as a matter of policy require a subpoena as a condition to disclosing documents in their possession. However, Ms. Huber's full cooperation is expected. It is expected that the hearing date of August 10, 1993, will remain firm and that Huber can present evidence on the added issues immediately following her comparative case.